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No. 93-1047

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PETER BRANTON,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITIONER'S BRIEF IN REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In our Petition, we demonstrated that the court of appeals' determination that Mr. Branton lacked standing to appeal the FCC's denial of his complaint conflicted with other listener standing decisions rendered in the circuits. We showed that listener standing has been routinely and uniformly acknowledged by the courts of appeals as a means to protect the public interest in broadcasting, a position first articulated by this Court more than fifty years ago in *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942).

In the main, the Government does not disagree with our position. It candidly acknowledges, as it did below, that "the court of appeals' analysis was flawed." Brief For the Federal Respondents In Opposition ("Fed. Opp.") at 9. Nevertheless, the Government argues that this case "does not present an appropriate vehicle for this Court to consider the D.C. Circuit's approach to listener standing." *Ibid.*

To the contrary, this case presents a classic controversy requiring the Court's resolution. The conflicts created by the lower court's opinion -- both intercircuit and intracircuit -- are stark. Moreover, the question is important to the growth of the law of standing and there is no evident value in allowing the issue to "simmer" among the courts of appeals.

1. The Government argues (Fed. Opp. at 11) that there is no conflict among the circuits on this issue and that the lower court "did not question either petitioner's standing to seek relief from the Commission or the continuing availability of viewer or listener standing to seek judicial review under established precedent in the court's own circuit." Fed. Opp. at 8. The Government is wrong on both counts.

The lower court's decision is a renunciation of a standard which the D.C. Circuit and other courts of appeals have followed for many years. In a break from its own long-standing precedent, the D.C. Circuit applied the formula of this Court's *traditional standing analysis* -- reflected in such cases as *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992) and *Los Angeles v. Lyons*, 461 U.S. 95 (1983) -- to broadcast regulation. The decision thus sets up a direct challenge to the widespread view among the courts of appeals that "*conventional principles of standing are inappropriate in the unique context of broadcast regulation.*" *Maier v. FCC*, 735 F.2d 220, 227 (7th Cir. 1984)(emphasis added). As the Seventh Circuit explained, "the concept of standing in the context of

broadcast regulation is different from that applied in other contexts, because it is the interests of an amorphous, disorganized group called 'the listening public' that are at stake. In order to ensure that the rights of the listening public are adequately protected, courts have construed the concept of standing very broadly." *Id.* at 228.

The Government acknowledges as "well settled" the proposition "that viewers and listeners have standing in various circumstances to sue the FCC to challenge broadcasters' noncompliance" with federal law or agency regulations. Fed. Opp. at 4. The Government likewise acknowledges that the "liberalized standing" conferred upon radio listeners and television viewers, predicated upon the public interest in broadcasting, "is consistent with Article III." *Id.* at 6 n. 3. Furthermore, the Government cites with approval the application of this standard through the years by "the D.C. Circuit and other courts of appeals" and "in a number of contexts." *Id.* at 7. Yet, the lower court's opinion is a clear departure from the decisions of other circuits, *e.g.*, *Maier*, *supra*, and from its own decisions. *See*, *e.g.*, *Llerandi v. FCC*, 863 F.2d 79 (1988); *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (1975)(involving the statute at issue in this case, 18 U.S.C. § 1464); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (1966). Indeed, the D.C. Circuit has expressly recognized the special role "representatives of the public have ... in FCC proceedings concerning obscenity determinations." *Illinois Citizens Committee*, 515 F.2d at 406.

Thus, in the simplest terms, the question created by the D.C. Circuit's decision is whether the view that "conventional principles of standing are inappropriate in the unique context of broadcast regulation" (*Maier*, *supra*) remains valid law, in light of this Court's standing jurisprudence of the past decade.

2. Notwithstanding the Government's view that the lower court's standing analysis was erroneous, it suggests that review by the Court of the merits of Mr. Branton's standing to appeal is inappropriate. The Government's position directly contradicts the arguments it presented to the court of appeals.

First, the Government is concerned that because the record "does not indicate whether and to what extent petitioner was a repeat listener of stations carrying NPR, it does not provide a well developed factual setting for evaluating the court of appeals' application of this Court's injury-in-fact cases to the context of viewer and listener standing." Fed. Opp. at 10; *see also id.* at 8.

In its response to the intervenors' rehearing petition, the Government rejected this argument when it was articulated by the court of appeals in the decision below. The court had asserted that the prospect of Mr. Branton's again being confronted with indecent programming was too "marginal" to satisfy the "immediacy" requirement of Article III, implying that other types of cases (as opposed to indecency complaints) might meet that test. In response, the Government argued that the "possibility that Branton would be exposed to an indecent broadcast in the future as a result of the decision here seems no more speculative," than the "injury" suffered by complaining viewers and listeners in other cases -- "[y]et the court had no difficulty upholding the [complainants'] standing as listeners." FCC Response To Petition For Rehearing at 5. That is, to put it conversely, the Government argued that if the "immediacy" requirement could not be satisfied in Mr. Branton's case, it could not be satisfied in any number of other cases where the D.C. Circuit and other courts of appeals historically have conferred standing upon a listener or viewer.

Indeed, so radical did that state of affairs strike the Government that it declared: "No one has argued -- and no court has even suggested -- that the 'immediacy' element of

constitutional standing analysis, as applied to a viewer/listener's challenge to FCC rejection of an argument related to broadcast programming, required anything more than that the viewer/listener reside within the service area of the station at issue." FCC Response To Rehearing Petition at 3. It is thus incongruous for the Government to argue at this stage that a different factual setting will provide a better light in which to evaluate the lower court's divergent standard. As the Government previously recognized, the fundamental problem with the lower court's approach is that other fact patterns cannot, by the very nature of the immediacy requirement imposed below, give flexibility to the lower court's test. The immediacy requirement either must be so relaxed as to make the test no different in effect than the "liberalized" approach typically applied to viewer/listener standing cases -- in which case the standard is devoid of real meaning, or the immediacy requirement will foreclose a host of plaintiffs who historically have been permitted to challenge broadcast regulations from doing so in the future.

Thus, the Government's "wait and see" attitude is no more appropriate in this setting than it would be, for instance, in a case where one appellate court ruled that a certain federal constitutional provision did not apply to the states while, on the same issue, other appellate courts had ruled to the contrary. It would not be conceptually valid to suggest that other fact patterns might crystallize the controversy -- for the approaches are incompatible. The Government made this same point in pragmatic terms to the court below. The panel's approach, said the Government, "would likely create practical difficulties in determining how much alleged misconduct is sufficient to establish injury for purposes of viewer/listener standing." FCC Response To Petition For Rehearing at 5.

The lower court's standard works a radical curtailing of the universe of plaintiffs with standing to challenge broadcast regulations. This Court may decide ultimately that such a limitation is sound, but it is disingenuous for the Government to pretend that anything less than this is at stake in this case.

Second, the Government states that review is inappropriate because Mr. Branton's "complaint did not specify what sanctions he sought from the FCC" and that "[u]nder the court of appeals' reasoning ... it would appear that a complaint requesting license revocation would appear to be cognizable under the court's reading of *UCC*." Fed. Opp. at 10. Again, the Government has oscillated. Before the court of appeals, the Government took the opposite position:

> The panel appears to leave open the possibility that Branton would have been able to satisfy the injury-in-fact requirement if he had come to the court complaining about an FCC decision to renew a license of a broadcast station that had broadcast the program which, ..., violated 18 U.S.C. 1464. *Id.* Contrary to the panel's implication, there does not appear to be any basis for a distinction between the renewal and complaint context for purposes of the 'injury-in-fact' analysis.

FCC Response to Petition For Rehearing at 5. As we demonstrated in our Petition at 15-18, there are various remedies available to the FCC, including license revocation. The difference between a formal license revocation and lesser sanctions is one of degree. Thus, we see no logic in the Government's position (Fed. Opp. at 10) that a complainant's standing is a function of the severity of the sanction he petitions the FCC to impose. A complainant has no greater or lesser interest to challenge a license renewal or to seek a license revocation than he has to seek a lesser sanction.

3. As we noted above, this is not a case where this Court's permitting the issue to play in the courts of appeals will be beneficial. The competing standards of listener standing at issue -- the approach adopted by the D.C. Circuit in this case *vs.* the liberalized approach which has been applied heretofore in the broadcast context -- are conceptually incompatible. The "immediacy" component of the traditional standard -- in the sense of a direct, particularized injury -- is not required under the standing analysis which the courts have followed in the broadcast context. Because of the force of the "principle that private parties are needed to vindicate the public interest in Commission proceedings" *(Maier,* 735 F.2d at 228), it has been sufficient that a listener simply demonstrate that he reside's within the service area of the station. Absent the "immediacy" linchpin of traditional standing analysis, it is difficult to envisage how other circuits' application of the *Maier* approach can be affected one way or another by the D.C. Circuit's application of the traditional standing approach. That another court of appeals might one day be receptive to the D.C. Circuit's approach only perpetuates, it does not resolve, the question whether such an approach is lawful in the context of listener/viewer standing.

The Government's attempt to distinguish this case from the Seventh Circuit's holding in *Maier v. FCC, supra,* misses the mark. Given the enunciation of the listener standing approach explicitly set forth in *Maier,* it cannot seriously be contended that Mr. Branton's case would have been dismissed for lack of standing had it been reviewed under the *Maier* standard. That standard confers standing upon a listener or viewer by virtue of his residence within the service area of the broadcast station. As the *Maier* court observed, "a direct, concrete, particularized injury is unnecessary for a party to have standing as a representative of the public interest. *Maier,* 735 F.2d at 229-230. A contrary position is "not only ... completely unprecedented but also would undermine

seriously the functional relationship between the Commission and the courts of appeals." *Ibid.* This case, of course, includes the further "injury" of an offense to a listener's sensibilities, making it an even plainer matter under the Maier standard.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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